IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980
Docket No. 80-1064

JEROME SINGLETON,

Petitioner,

-against-

CITY OF NEW YORK, RONALD SALZER and ANTHONY DELLAVENTURA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. In this action pursuant to 42 U.S.C. §1983, are petitioner's independent but related claims based upon assault, false arrest and malicious prosecution part of an indivisible cause of action governed by a single accrual date which determines the timeliness of those claims?

2. Was the adjournment in contemplation of dismissal and subsequent dismissal of the criminal action against petitioner pursuant to N.Y. Crim. Proc. Law §170.55 a favorable determination which would support his §1983 claim for malicious prosecution?

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STATEMENT OF FACTS

On November 14, 1975, respondents Ronald Salzer and Anthony Dellaventura, New York City police officers, arrived in plainclothes at a restaurant in response to a report from the Communications Division of the Police Department that a black male had committed a robbery at another restaurant. Their arrival at the wrong restaurant was due to an error as to the correct location. They proceeded to arrest petitioner, who is a black male.

In the ensuing §1983 action, it was petitioner's contention that respondents had failed to identify themselves as police officers, assaulted petitioner and falsely arrested him for the crime of robbery. Petitioner also alleged that, upon learning that he was not the robbery suspect they were seeking, the police officers falsely

charged petitioner with felonious assault and subjected him to criminal prosecution.

Respondents denied that the officers had failed to properly identify themselves, assaulted petitioner or ever made an arrest of him for the crime of robbery. Respondents contended that petitioner had been properly arrested for the crimes of Assault (New York Penal Law §120.00), Resisting Arrest (New York Penal Law §205.30), and Obstructing Governmental Administration (New York Penal Law §195.05). Respondents admitted that after his arrest on November 14, 1975, petitioner was taken to the station house, and it was established that he was not the perpetrator of the previous robbery.

The records of the Criminal Court of the City of New York (Docket No. N561678) indicate that petitioner was arraigned on the above-mentioned criminal charges on

November 15, 1975, and held over for trial after a preliminary hearing before Judge Frederick S. Berman. A subsequent trial before Judge G. Eiber ended in a hung jury on March 31, 1976. With petitioner's consent, on June 14, 1976, a motion was made and granted pursuant to §170.55 of the New York Criminal Procedure Law that the action be "adjourned in contemplation of dismissal." On December 16, 1976, the action was deemed dismissed by the court "in the furtherance of justice," in accordance with the provisions of Criminal Procedure Law §170.55(2).

Petitioner subsequently commenced two actions, both still pending, in the State courts alleging assault, false arrest, and malicious prosecution. Petitioner did not commence his District Court action based

upon 42 U.S.C. §1983 until February 9, 1979, more than three years after the arrest.

Respondents respectfully submit that the District Court and the Court of Appeals properly found that under §1983 petitioner's claims of false arrest and assault were barred by the statute of limitations and that his claim of malicious prosecution was unsupported as a matter of law.*

POINT I

PETITIONER'S CIVIL RIGHTS CLAIMS OF ASSAULT AND FALSE ARREST ARE CLEARLY UNTIMELY.

The Court of Appeals was correct in holding that petitioner's §1983 claims based upon an alleged assault on November 14, 1975, and an alleged false arrest on the same day

*Unless otherwise indicated, numerals in parentheses refer to pages of the Petition for Writ of Certiorari.

were time-barred.* The court, applying federal law to determine the time of accrual of these claims, asserted that the date of accrual was November 14, 1975, the date when petitioner knew or had reason to know of the injury upon which his claim is based (9a).

*In light of the language of the Court in Chapman v. Houston Welfare Rights Organization 441 U.S. 600, 618 (1979), that "§1983 does not provide any substantive rights at all," respondents argued before the Court of Appeals that the most applicable statute of limitation is either the one year and ninety days provided by N.Y. General Municipal Law §50-i or the one-year limitation provided by N.Y.C.P.L.R. §215 for actions of assault, false imprisonment and malicious prosecution. Previously, the Court of Appeals had repeatedly held that the three-year statute of limitations provided by N.Y. C.P.L.R. §214(2) which refers to actions "to recover upon a liability... created or imposed by statute" to be controlling in §1983 actions. The Court of Appeals found it unnecessary to resolve this issue since it concluded that petitioner's claims would be barred even if the three-year statute of limitation were applicable (5a-7a).

See Kaiser v. Cahn, 510 F.2d 282, 285 (2d Cir., 1974); Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir., 1977). Petitioner did not commence his District Court action until February 9, 1979, more than three years after this date of accrual.

Nevertheless, petitioner argues that his action is not time-barred. He asserts that the statute of limitations should be deemed to have been tolled pending determination of the criminal action against him (3-4). Petitioner cites the First Circuit's decision in Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir., 1974), for the proposition that the statute of limitations governing a §1983 action is tolled pending determination of a related criminal proceeding (3). However, in its opinion the court conceded that "the requirement that state criminal proceedings be completed before suit for

damages may be instituted may be inapplicable where the result might be that the right to sue would be lost entirely, as for example, where the applicable statute of limitations would run ..." 498 F.2d at 1254.

In any event, this Court has recently held that state tolling rules, like state statutes of limitations, apply to federal actions brought under §1983 unless such rule is inconsistent with federal law. Board of Regents v. Tomanio, ___ U.S. ___, 100 S. Ct. 1790 (1980). In Tomanio, respondent argued that the time for filing her §1983 claim was tolled while she pursued her related but independent cause of action in state court although such a toll was not available under New York law. In rejecting this argument and finding plaintiff's federal claim untimely, the Court stated (100 S. Ct. at 1799):

> We believe that the application of New York law of tolling is in fact more consistent with the policies of 'federalism' invoked by the Court of Appeals, than a rule which displaces the state rule in favor of an ad hoc federal rule.

Similarly, petitioner herein seeks a tolling of the limitation period for bringing his §1983 claim although there is no state provision for tolling the time for bringing a cause of action for assault or false arrest during the period when a related criminal prosecution is pending against a plaintiff. See N.Y. C.P.L.R. §§201, 207, 208. Considering the Court's holding in Tomanio, petitioner's argument for an improvised federal rule of tolling is clearly without merit. The undisputed fact was that nothing prevented petitioner from commencing his suit during

the pendency of the criminal proceeding.*

Petitioner also argues that his §1983 action, containing claims of assault, false arrest and malicious prosecution, is in fact "a single §1983 cause of action" and thus the Court of Appeals erred in applying different accrual dates to an indivisible cause of an action which did not accrue until December 14, 1976, the date the criminal prosecution was dismissed and his claim of malicious prosecution accrued.

In support of this view, petitioner relies on the decision in Smith v. Cremins,

*Petitioner contends that he "could not reasonably be expected to pursue his federal remedy while he was defending himself in the state criminal court involving the very facts to be litigated in the §1983 action" (4). The Court of Appeals effectively rebutted this contention by noting that if abstention was appropriate the §1983 action would be stayed pending the outcome of the criminal proceedings (14a).

308 F.2d 187 (9th Cir., 1962). This reliance is, however, misplaced. In Smith, the Court did not address the issue of whether separate and independent claims in a §1983 action could have different accrual dates in determining the running of the statute of limitations, since all the subject claims had accrued on the same date. Rather, the Court held only that a single state statute of limitation should apply to §1983 actions, regardless of the nature of the individual claims, which was in actuality consistent with the Court of Appeals' decision herein.*

Petitioner's position is contrary to the law of the Second Circuit where it is "well-settled that a §1983 complaint may

*The Court of Appeals applied the three-year statute of limitations provided by N.Y.C.P.L.R. §214(2) to determine all of petitioner's claims (9a).

require the borrowing and the application of more than one statute of limitations." Williams v. Walsh, 558 F.2d 667, 670 (2d Cir., 1977) (citations omitted).

Petitioner's theory of a single accrual date governing all claims in a §1983 action is also inconsistent with several recent holdings of this Court. In Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 616-618 (1979), and Davis v. Passman, 442 U.S. 228, 238 n. 6 (1979), the Court stated that §1983 does not provide any substantive rights but merely provides a remedy for a violation of a substantive right. And in Board of Regents v. Tomanio, supra, 100 S. Ct. at 1795, the Court said that "In §1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if

possible. In most cases, they are binding rules of law."

Petitioner's argument for a judicially imposed rule in §1983 actions utilizing a single accrual date for independent but related claims in clear disregard of state statutes of limitations cannot be reconciled with this Court's analysis of §1983 actions as not providing any new substantive rights to a claimant and being subject to appropriate state time limitations to commence suit. Under New York law separable but related claims are not lumped together to apply a single accrual date for suit.

Petitioner's novel theory is solely an attempt to extend the statute of limitations on otherwise stale claims. There is no compelling justification for such a radical departure from common-law principles. On the other hand, such a departure

would undoubtedly severely prejudice defendants in §1983 actions who would thus be forced to defend themselves against claims based on acts which may have occurred many years before with only the accrual date of the most recent related claim being operative in determining the timeliness of the entire action.

POINT II

THE DISMISSAL OF THE CRIMINAL ACTION AGAINST PETITIONER PURSUANT TO NEW YORK CRIMINAL PROCEDURE LAW §170.55 WAS NOT A RESOLUTION ON THE MERITS AND THUS CANNOT SUPPORT HIS §1983 CLAIM OF MALICIOUS PROSECUTION.

In determining the import of petitioner's acceptance of an "adjournment in contemplation of dismissal" pursuant to N.Y. Crim. Proc. Law §170.55, the Court of Appeals engaged in statutory construction and interpretation of

state law. An issue of this nature, which is wholly dependent on the meaning and application of the law of a particular state and, therefore, does not have widespread impact on other jurisdictions, we would submit, should be left to the individual Court of Appeals to resolve based on its special knowledge and familiarity with the law of the states embraced within their jurisdiction, particularly when, as in the instant case, there is strong support for their position.

The holding by the Court of Appeals that the dismissal received by plaintiff was not a final determination which established that plaintiff was not guilty of the offense charged and thus could not support his claim of malicious prosecution was correct. As the majority's opinion indicates, their holding was supported by case law, Cardi v. Super-

market General Corp., 438 F. Supp. 633 (E.D.N.Y. 1978); Kenul v. Hollander, 86 Misc. 2d 466 (Dist. Ct., Nassau Co., 1976); see, also, Tucker v. Duncan, 499 F. 2d 964 (4th Cir., 1974), as well as other legal authority, Vol. 11A, McKinney's Consolidated Laws of New York Annotated, Practice Commentary on N.Y. Crim. Proc. Law §170.55, p. 5; Pirro, Adjournment in Contemplation of Dismissal: Criminal Procedure Law Section 170.55, 38 Alb. L. Rev. 223, 231-32 (1974); Restatement (Second) of Torts, §660, Comments a and b (1977) (15a-16a).

In confirming that an adjournment in contemplation of dismissal was far from being in all respects favorable to the defendant, the Court of Appeals properly found that this procedure was not unlike probation (16a). The Court noted (16a):

> The six-month hiatus between adjournment and dismissal is especially significant. It is a period of observation, during which time the defendant's behavior may be observed to determine whether the prosecutor's acquiescence in the adjournment was justified. The prosecution decision to restore the case to the calendar is totally discretionary and need not be based on factors relating to the defendant's original innocence or guilt.

Since petitioner had already had one trial which resulted in a hung jury, he suggests that he received "no special break" or benefit by consenting to the adjournment in contemplation and, therefore, the agreed-to disposition was in fact a favorable termination on the question of his innocence (5-6). This view is obviously erroneous.

By agreeing to this disposition, petitioner sought to avoid a new criminal trial which may have resulted in his conviction.

An abandonment of prosecution by an agreement or compromise with the accused cannot be viewed as a favorable termination, since such a result does not imply lack of reasonable ground to prosecute. Zebrowski v. Bobinski, 278 NY 332 (1938); Loeb v. Teitelbaum, 77 AD 2d 92, 100-101 (N.Y. App. Div., 2d Dept., 1980); see, also, Prosser, Law of Torts (4th Ed., 1971), pp. 839-840.

CONCLUSION

THE PETITION FOR A WRIT SHOULD BE DENIED.

Respectfully submitted,

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